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No. 80-5889

IN THE

Supreme Court of the United States

October Term, 1980

JOHN SANTOSKY II and ANNIE SANTOSKY,
Petitioners,

against

BERNARDT S. KRAMER, Commissioner, Ulster County Department of Social Services,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT.

BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK.

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(3057)

Question Presented.

Whether section 622 of the New York Family Court Act affords parent and child due process by providing for "a fair preponderance of the evidence" as the standard of proof in a proceeding to terminate parental rights based on permanent neglect?

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT.

Brief *Amicus Curiae* of the Attorney General of the State of New York.

Interest of *Amicus Curiae.*

The Attorney General submits this *amicus curiae* brief pursuant to Rule 36(4) of the Rules of this Court in support of the constitutionality of section 622 of the New York State Family Court Act. The Attorney General had heretofore pursuant to New York Executive Law, § 71,

submitted a brief to the Supreme Court of the State of New York, Appellate Division, Third Department, in support of the constitutionality of section 622 of the Family Court Act.

Summary of Argument.

In the State of New York, thousands of children were in foster care* for lengthy periods of time. Their parents did not want them but would not consent to their adoption. The parents' consent could only be dispensed with by a finding of abandonment which was most difficult to establish.

To further the best interests, needs and rights of children, the Legislature enacted the Permanent Neglect Statute here under review.

Under the statute, the State's first obligation was to reunite the child with the natural parent. Where positive nurturing parent-child relationships no longer existed, a proceeding to terminate parental rights and free the child for adoption was to be commenced.

The allegations of the petition* must be supported by a fair preponderance of the evidence (Family Court Act, § 622).

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*In its decision in *Smith v. Organ. of Foster Families for E. & Reform*, 431 US 816 (1977), this Court outlines in detail the present New York statutory system regulating foster care and throughout the decision refers to various statistical studies, reports, law review articles and opinions of noted text writers on child care services. See, also, *Child v. Beame*, 412 F Supp 593 (SDNY, 1976).

*Family Court Act, § 614 requires that the petition allege (a) child under 18 years of age; (b) child is in the care of an authorized agency; (c) the agency has made diligent efforts to encourage the parental relationship; and (d) the parent notwithstanding the agency's efforts has failed for a period of more than one year following the date the child came into the agency to substantially and continuously or repeatedly maintain contact with or plan for the future of the child although physically and financially able to do so.

Custody proceedings are more a matter of State concern than Federal. The State acts within its constitutional power when it regulates procedures concerning the burden of proof.

Children have constitutional rights which are entitled to due process protection under the Fourteenth Amendment.

In custody proceedings the Court must strike a balance between the rights of the parents and the rights of the child. Each is entitled to due process. "Fundamental fairness" to each can only be achieved by adoption of the preponderance standard of proof.

Statutory Framework.

Parental rights can be terminated in New York by approving adoption by another person (New York Domestic Relations Law [DRL], § 117) or by granting guardianship and custody to a person who will then be able to consent to the child's adoption (DRL, § 111[1] [f], New York Social Services Law [SSL], § 384-b[1][b], [8]) or by a permanent neglect proceeding such as the present one (Family Court Act [FCA] Art 6, Pt 1, §§ 611-34, SSL, § 384-b).

As for adoption, the consent of each living natural parent is necessary unless the parent has abandoned, surrendered or waived all rights to the child, DRL, § 111 (2) (a)-(b), (f), or is a convicted felon whose civil rights have not been restored, DRL, § 111(2) (d), or due to mental disability is now and for the foreseeable future will be unable to provide proper care for the child, DRL, § 111(2) (e), or has had his or her rights terminated pursuant to SSL, § 384-b. In virtually all cases involving children over fourteen years of age, the Court requires the child's consent, see DRL, § 111(1) (a). Except by cross reference to SSL, § 384-b, the adoption statutes do not state the stand-

ard of proof for determining when a parent's consent can be dispensed with. The ultimate decision to grant adoption is based on being "satisfied that the best interests of the adoptive child will be promoted thereby * * *" DRL, § 114. See DRL, §§ 115(1), 116(4). See, also, DRL, § 115-a(4).

Guardianship and custody terminating parental rights may be awarded by either the Family or Surrogate's Court based on the parent's death or abandonment. SSL, §§ 384-b(3) (d), (4) (a)-(b). Only the Family Court may terminate rights based on a finding of unfitness due to mental disability or, as in the present case, "permanent neglect". SSL, §§ 384-b(3) (d), (4) (c)-(d). (Ordinary neglect is defined in FCA, § 1012, SSL, § 412, and is a basis for removing a child but not for terminating parental rights.) The wishes of a child over fourteen years old will usually be considered. SSL, § 384-b(3) (k). The standard of proof in mental disability unfitness cases is "clear and convincing proof", while the standard in permanent neglect, abandonment and parental death cases is "a fair preponderance of the evidence * * *." SSL, § 384-b(3) (g). The ultimate decision to terminate is based on the child's best interests. SSL, § 384-b(1) (b), (3) (k).

Permanent neglect proceedings such as the present one are governed by New York Family Court Act, Art. 6, Pt 1 (§§ 611-34), SSL, § 384-b and FCA Art. 1, 2 and 11 to the extent the latter do not conflict with SSL, § 384-b. Parents have the right to counsel and to have counsel assigned to them if indigent. Family Court Act, § 262(a) (iv). The Court will appoint a law guardian (attorney) for the child "if independent legal representation is not available to such minor." *Id.*, § 249(a). The statute provides for two hearings, the first of which is a fact-finding hearing to determine whether the child is permanently neglected and a second dispositional hearing to determine what disposi-

tion should be made in accordance with the best interests of the child. Only competent, material and relevant evidence may be admitted in the fact-finding hearing, *id.*, 624. The allegations of the petition must be supported by a fair preponderance of the evidence, *id.*, 622.

The dispositional hearing determines whether "the best interests of the child" would be served by dismissing the petition, by suspending judgment for up to two years, or by terminating parental rights. *Id.*, §§ 614(1) (e), 623, 631. No specific standard of proof is set. Evidence must be material and relevant but hearsay and evidence about events subsequent to the commencement of the proceeding are admissible. FCA, § 624. The hearing itself can be waived if all consent and a dispositional order entered based on the evidence at fact-finding and the probation service report. *Id.*, § 625.

ARGUMENT.

Section 622 of the Family Court Act of the State of New York does not violate the due process clause of the Fourteenth Amendment of the United States Constitution by utilizing a fair preponderance of the evidence as the standard of proof in a permanent neglect proceeding.

A. Framework for Review.

The framework for review of the adequacy under due process of the standard of proof in New York's statutory scheme for terminating parental rights based on permanent neglect is set forth in last Term's decision involving the parents' right to counsel under North Carolina's termination law, *Lassiter v. Dept. of Social Services*, ____ US ____, 49 USLW 4586 (June 1, 1981). The Court unanimously agreed, *id.*, 49 USLW 4588 (Stewart, J.); *id.*,

4590, 4591 (Blackmun, J., dissenting); *id.*, 4597 (Stevens, J., dissenting), that the constitutionality under due process of parental right termination proceedings is to be analyzed by a balancing of the factors set out in *Mathews v. Eldridge*, 424 US 319, 335 (1976): the State's interest, the private party's interest, and the risk of error caused by the procedures used.

The *Lassiter* majority summarized its discussion of the *Eldridge* factors as follows, *id.* at 4589:

> "the parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high."

After balancing the *Eldridge* factors, the Court found that the constitutional right to counsel should be determined on a case by case basis. *Ibid.* It noted that the states were free to provide counsel by statute and that many of them had done so. *Id.* at 4590.

B. Application of *Eldridge* and *Lassiter* to New York Permanent Neglect Proceedings.

As in *Lassiter*, the parent's interest in procedural provisions of New York's permanent neglect laws is an extremely important one due to his or her constitutional rights to

rear the child, while possible criminal liability, relevant in *Lassiter,* is not affected by the standard of proof at fact-finding. As in *Lassiter,* here, too, "the State has an urgent interest in the welfare of the child ... ", 49 USLW at 4588. As will be shown, this interest is based on both pecuniary (foster care is expensive) and *parens patriae* [see SSL § 384-b(1) (b)] considerations. This interest coincides with the parent's insofar as the parent also wishes "an accurate and just decision", *ibid.* But where the parent is unfit and his rights should be terminated, then the parent's interests may be served by an unrealistically high standard of proof that will prevent the State from proving its case while the interests of the State and of the child require the lowest standard of proof compatible with accuracy. As to the risk of an erroneous decision extensive factual inquiry conducted under State auspices into experience under the permanent neglect statute provided abundant evidence (see "D" *infra*) that under the preponderance standard the risk of error still ran considerably in favor of the parent and against the child and the State.

C. New York Law Prior to 1976

The legislative history of New York's permanent neglect law demonstrates that the preponderance standard was initially chosen and later reaffirmed by the Legislature to reduce the number of cases in which parental rights were inappropriately *not* terminated. The statute was enacted about twenty years ago, reflecting, "increasing concern about the interests of the child as distinct from those of the parent," N.Y. Temporary State Commission on Child Welfare, *[The Children of the State], Barriers to the Freeing of Children for Adoption* (hereinafter "*Barriers*") (March 1976), p 11, and based on continuing reports that thousands of children in New York State were in perpetual foster care because their natural parents would neither take them back into their homes nor consent to their adop-

tion.* Only by a finding that the parent had abandoned the child could the child be adopted without the parent's consent. Such a finding, however, required acts so unequivocal as to bear one interpretation and one only, that the parent manifested an intention to abandon the child forever (*Matter of Bistany*, 239 NY 19, 24 [1924]). He, who would attempt to prove abandonment, bore a very heavy burden. At that time, there existed no separate judicial proceeding to terminate parental rights.**

In 1959, the Legislature of the State of New York enacted its first "Permanent Neglect Statute". In *Matter of Anonymous (St. Christopher's Home)*, 40 NY2d 96 (1976), the Court of Appeals concisely reviews the historical background leading to the enactment of the Permanent Neglect Statute as follows (100, 101):

> "The origin of the guardianship and custody proceeding can be traced to chapter 438 of the Laws of 1884. Even then parental rights were subject to termination, guardianship and custody to be assumed by an agency upon a finding of abandonment. Such a finding required a showing of acts so unequivocal as to bear one interpretation and one only, that the parents manifested an intention to abandon their child forever (*Matter of Bistany*, 239 NY 19, 24) or, as it was phrased in *Matter of Maxwell* (4 NY2d 429, 433), 'a settled purpose to be rid of all parental obligations and to forego all parental rights', no lesser showing being sufficient. Such a heavy burden was deemed appropriate 'since the right of a parent, under natural law, to establish a home and bring up children is a fundamental one and beyond the reach of any court'

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*Gordon, *Terminal Placements of Children and Permanent Termination of Parental Rights: The New York Permanent Neglect Statute*, 46 St. John's L Rev 215, 218 (1971) (hereinafter "Gordon").

**Gordon, p 230.

(*People ex rel. Portnoy v. Strasser,* 303 NY 539, 542; *Meyer v. Nebraska,* 262 US 390, 399.)

"Adoption, unknown to the common law, exists solely by statute (*Betz v. Horr,* 276 NY 83, 86-87; *Matter of Thorne,* 155 NY 140, 143). The first general statutory provision covering adoption was chapter 830 of the Laws of 1873. Then, as now, parental consent was necessary with few exceptions, one among them being abandonment (L 1873, ch 830, § 11; Domestic Relations Law, § 111, subd 4).

"In 1959 the Legislature recognized the existence of a serious situation which had resulted from the stringent test set for the finding of abandonment. This situation was compounded by the necessity for such a finding of abandonment, absent parental consent, in the adoption process. In the memorandum of the Citizen's Committee for Children of New York City, Inc., which was incorporated into the Legislature's report, it was noted that section 384 of the Social Services Law (formerly entitled Social Welfare Law) in providing for the termination of parental rights 'makes no provision for the vastly greater number of children who, though not "abandoned" in the legal sense, have been abandoned in every other sense and are doomed to live in foster homes or institutions because the natural parents are unwilling to provide them with a family life even though able to do so and even though given every assistance by social agencies. Recent studies disclose that there are thousands of children in foster homes or institutions where they have been placed by their natural parents or by orders of the children's courts, who grow up with only the barest of contact with their natural parents. * * *' "

The legislation recognizes the existence of two rights—the parents' and the child's. In his Memorandum of approval (1959 McKinney's Session Laws, p 1750), the Governor stated "These procedures recognize a parent's right with respect to his child, but at the same time recognize a child's right to have every opportunity for normal family affection and care." Adoption of the preponderance of evidence standard of proof reflects a "fundamental value determination" (*In re Winship*, 397 US 358, 372 [1969]) by the legislature that a child's right is equal to the parent's right. This standard of proof affords due process to both parent and child. "Fundamental fairness"* to each is achieved by not tipping the scales of justice in favor of one over the other.

That a child, as well as an adult, is constitutionally entitled to due process under the Fourteenth Amendment cannot be questioned. This Court has so held. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. See, *e.g.*, *Breed v. Jones*, 421 U.S. 519 (1975); *Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *In re Gault*, 387 U.S. 1 (1967)." *Planned Parenthood of Central Missouri, et al. v. Danforth, Attorney General of Missouri, et al.*, 428 US 52 (1975). See also, *Parham v. J.R.*, 442 US 584 (1978).

D. The 1976 Recodification.

Far from resulting in inappropriate termination of parental rights because the standard of proof was too low, the permanent neglect statute of 1959 failed to free children for adoption in an efficient timely manner. *Bar-*

Lassiter v. Department of Social Services, ___ US ___, 49 USLW 4586, 4587.

riers, pp i-ii, 17. Following an intensive year-long statewide empirical study and consultation with experts, *Barriers,* pp iii-vii, 17-18, the Legislature recodified the permanent neglect laws, L 1976, ch 666.

While the legislation did not confer any right on a child to be freed promptly for adoption, the legislative findings of SSL § 384-b(1) recognized that many children do remain longer than they should in foster care, *Barriers,* p 21. See *Smith v. Organization of Foster Families,* 431 US 816, 835, n 37 (1977). The Legislature explicitly attempted in the new law both to protect "the rights of the natural parents" and to further "the best interests, needs, and rights of the child", SSL § 384-b(1) (b).

The preponderance standard was preserved for permanent neglect because the Legislature found that the courts were applying with extreme rigor the statutory definitions of the items which had to be proved. Even where parental interests were flickering and lacked substance, parental rights could not be terminated. *Barriers,* pp 13-16. The standard of proof may have been defined as a preponderance but in practice it was far higher.

As part of the recodification, the Legislature elaborated the definitions of the items to be proved in permanent neglect cases ["diligent efforts", "contact", "plan", see SSL § 384-b(7)] and even specifically forbade considering certain factors [adoptability, see SSL § 384-3(i)] based on its study of how to free children for adoption who should be freed. *Barriers,* pp 23-27, 32-6, 49-50. With all experience showing that the risk of error ran considerably in favor of the parent and against the child and the State, a number of authorities suggested that once the petitioner

produced a preponderance of evidence for permanent neglect, the burden of proof be shifted to the respondent parent to show why rights should *not* be terminated.* *Barriers,* pp 27-31. The Legislature declined to shift the burden or change the standard of proof at fact-finding or dispositional permanent neglect hearings. Rather, it adjusted the factors to be proved as a way of producing more accurate and just results.

By way of contrast, when the Legislature created new grounds for termination on unfitness due to mental disability (L 1973, ch 863; L 1975, ch 706, enacting former SSL § 384[7], repealed and recodified as SSL § 384[7], repealed and recodified as SSL § 384-b[4] [c] by L 1976, ch 666), it provided a higher standard of proof, to wit, clear and convincing evidence. The recodifers were well aware of the contrast, *Barriers,* pp 5-6, and preserved it. Moreover, when the recodification drafters proposed for the first time to allow termination in ordinary neglect proceedings (there were to be two grounds, child abuse amounting to a depraved indifference to human life and repeated child abuse without foreseeable rehabilitation), they again proposed a clear and convincing standard. *Barriers,* pp 40-42.**

*Similar proposals were advanced by legal commentators. See Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights* 28 Stanford L Rev 623, 705-6 (1976), and were adopted by the Juvenile Justice Standards Project, although not by its sponsors.

**The difference in the standards proposed is clearly based in part on the fact that the grounds are new, without the baggage of excessively restrictive interpretations. The other cause is that one child abuse ground called for proof of manslaughter, an act that would clearly be taken to criminal court. The other proposed ground, like the existing mental disability ground, called for prediction as to the foreseeability of recovery, something which was sufficiently and inherently uncertain that the Legislature chose to require anyone seeking termination based on such a prediction to produce more proof than usual.

E. Experience of Other Jurisdictions.

In 1974, more states had statutes applying their usual civil procedure standard of proof, usually explicitly referred to as a preponderance, in termination cases than had clear and convincing as the standard. See Katz, Howe & McGrath, *Child Neglect Laws in America,* 9 Fam L Q 1, 48-49 (Table X), 66-8 (1975). As shown by petitioners' tabulation of current statutes and by the dates of the cases setting standards in the absence of statutes, it appears that the situation has changed and that there is a recent trend as a matter of policy to develop higher standards of proof. Mere prevalence does not, however, imply that the standard is *necessary* for due process, *Lassiter v. Dept. of Social Services, supra,* 49 USLW at 4590, and indeed, the very newness of the development suggests that having the higher standard applied is not a tradational, fundamental constitutional value for due process purposes. See note, "Developments in the Law—The Constitution and the Family", 93 Harv L Rev 1156, 1177-87 (1980).

F. The Preponderance Standard Adequately Protects Petitioners' due process Rights and the State's Interests in the Rights of the Child.

The New York Court of Appeals in *Matter of Bennett v. Jeffreys,* 40 NY2d 543 (1976), as a predicate to its conclusion that children, as well as parents, have rights (*id.,* p 548), stated (p 546):

> "that a child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of a constitutional magnitude [cit om]."

Not only does the State of New York have an interest in the well being of its children, it has a duty to protect them and "to see that they are 'safeguarded from abuses' which might prevent their 'growth into free citizens.' " (*Ginsberg v. State of New York,* 390 US 629, 640 [1968].)

In *Patterson v. New York,* 432 US 197 (1977), this Court upheld New York's rule of evidence of placing on the defendant the burden of proving by preponderance of the evidence the affirmative defense of extreme emotional disturbance when charged with the crime of second degree murder. In *Patterson,* this Court held (*supra,* pp 201, 202):

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine v. California,* 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Speiser v. Randall,* 357 U.S. 513, 523 (1958); *Leland v. Oregon,* 343 U.S. 790, 798 (1952); *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934)."

Just as preventing and dealing with crime is much more the business of the State than it is of the Federal government; so is parent-child custody much more the business of the State than that of the Federal government. This Court should give the widest deference to New York's legislative judgment that attempts to solve the problem with which the State was confronted "the plight of thousands of forsaken children whose parents had abandoned their responsibilities for care and support", *Matter of Klug,* 32 AD2d 915, 916 (1st Dept, 1969); *In re Gault, supra,* p 70.

The petitioners' contention that the burden of proof in a parent-child custody proceeding should be "convincing" is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Patterson v. New York, supra,* p 202.) Most recently, this Court has upheld the power of Congress to utilize the "preponderance" rule in loss of citizenship cases. In *Vance v. Terrazas,* 444 US 252 (1980), the Court held (pp 264, 266) as follows:

> "With respect to the principal issues before it, the Court of Appeals held that Congress was without constitutional authority to prescribe the standard of proof in expatriation proceedings and that the proof in such cases must be clear and convincing evidence rather than by the preponderance standard prescribed in § 1481(c). We are in fundamental disagreement with these conclusions.
>
> * * *
>
> "We are unable to conclude that the specific evidentiary standard provided by Congress in §1481(c) is invalid under either the Citizenship Clause or the Due Process Clause of the Fifth

> Amendment. It is true that in criminal and involuntary commitment contexts we have held that the Due Process Clause imposes requirements of proof beyond a preponderance of the evidence. *Mullaney v. Wilbur,* 421 U.S. 684 (1975); *Addington v. Texas,* ____ U.S. ____ (1979). This Court has also stressed the importance of citizenship and evinced a decided preference for requiring clear and convincing evidence to prove expatriation. *Nishikawa v. United States, supra.* But expatriation proceedings are civil in nature and do not threaten a loss of liberty. Moreover, as we have noted, *Nishikawa* did not purport to be a constitutional ruling, and the same is true of similar rulings in related areas. *Woodby v. Immigration Service,* 385 U.S. 276, 285 (1966) (deportation); *Schneiderman v. United States,* 320 U.S. 118, 125 (1943) (denaturalization). None of these cases involved a congressional judgment, such as that present here, that the preponderance standard of proof provides sufficient protection for the interest of the individual in retaining his citizenship. Contrary to the Secretary's position, we have held that expatriation requires the ultimate finding that the citizen has committed the expatriating act with the intent to renounce his citizenship. This in itself is a heavy burden, and we cannot hold that Congress has exceeded its powers by requiring proof of an intentional expatriating act by a preponderance of evidence."

Although this Court may evince a "decided preference for requring clear and convincing evidence", it should not impose such preference on the State of New York which has expressed its legislative judgment that "the preponderance standard of proof provides sufficient pro-

tection for the interests" (*Vance v. Terrazas, supra,* p 266) of both the parent and the child in a custody proceeding.

If, as this Court holds, "due process" expresses the requirement of fundamental fairness; if children who have been forsaken by their natural parents, who have abandoned their responsibilites for their children's care and support, are ever to achieve "what should be their [his] birthright: a responsible and affectionate parental relationship—'a happy home and the love and affection to which all children are entitled.' " (*Matter of Jones,* 59 Misc 2d 69, 74 [Family Court, New York County, 1969]); if these children's rights are to be recognized, then "fundamental fairness" dictates that the preponderance of evidence rule be adopted as the standard of proof.

CONCLUSION.

The order and judgment of the Supreme Court of the State of New York, Appellate Division, Third Department, should be affirmed.

Dated: Albany, New York
July 31, 1981

Respectfully submitted,

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